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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. .....

AMERICAN CAST IRON PIPE COMPANY,
Petitioner,
vs.
RUSH PETTWAY, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in holding that it had appellate jurisdiction under the collateral order doctrine, as enunciated by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), to review the District Court's Order of Referral to Special Master which directs the special master to proceed at Stage II of this Title VII class action with the determination of the back pay claims of the putative class on an individual-by-individual basis?

2. Does the decision below, mandating that the District Court use a classwide formula to compute back pay due specific individuals in this Title VII class action, conflict with this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977)?

3. Did the court below err in ordering a classwide approach to the adjudication of back pay claims despite recognition that such an approach will result in awards to individuals who are unable to prove any monetary injury?

4. Did the court below err in depriving the District Court of its discretion to use individual-by-individual adjudications to determine the amount of back pay, if any, which is due each individual in this Title VII class action?

5. Did the court below err in holding that an individual putative class member who seeks an award of back pay at Stage II of a Title VII class action has no burden of proof?

INFORMATION REQUIRED BY RULE 28.1

American Cast Iron Pipe Company, petitioner herein, is a corporation incorporated under the laws of the State of Georgia. American Cast Iron Pipe Company is not a subsidiary of any other company and all of its subsidiaries are wholly owned.[1]

[1] The parties in the court below were:

1. Rush Pettway, Davis Jordan, Alex Fitts, and the class of black employees of the American Cast Iron Pipe Company ..... Plaintiffs-Appellants
2. American Cast Iron Pipe Company ..... Defendant-Appellee
3. Equal Employment Opportunity Commission ..... Amicus Curiae

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, American Cast Iron Pipe Company ("Petitioner" or the "Company"), respectfully prays that a writ of certorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on July 15, 1982. In addition, Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit denying petitioner's Suggestion for Rehearing *En Banc* which was entered on September 27, 1982.

OPINIONS BELOW

The District Court's Order of Referral to Special Master, which was the subject of the appeal below, is not reported, but is set forth in the Appendix at pages 203-07. The opinion of the United States Court of Appeals for the Eleventh Circuit is reported in *Pettway v. American Cast Iron Pipe Company*, 681 F. 2d 1259, 29 FEP 897, 29 EPD ¶ 32,953 (11th Cir. 1982). That opinion is also contained in the Appendix at pages 211-28. The order denying petitioner's Suggestion for Rehearing *En Banc* is set forth in the Ap-

pendix at page 229. The Appendix is presented separately from this Petition.

JURISDICTION

The judgment sought to be reviewed was dated and entered on July 15, 1982. Petitioner's timely Suggestion for Rehearing *En Banc* was denied on September 27, 1982. This Petition is being filed within ninety days of the Eleventh Circuit's order denying rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

The statutory provision involved in this proceeding is 42 U.S.C. § 2000e-5(g) which provides as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

This race discrimination class action was filed on May 13, 1966 under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. The case has had a long and tortuous history spanning a full trial, an attempted full settlement, four separate appeals to the United States Court of Appeals for the Fifth Circuit, a later settlement of the injunctive aspects of the case, and finally, an Order of Referral to Special Master directing a trial on the remaining back pay issues, the subject of the decision below. In the interests of brevity, the prior history will be substantially abbreviated.

After a prior appeal to the United States Court of Appeals for the Fifth Circuit on procedural grounds, *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (5th Cir. 1969) (a consolidated appeal including the *Pettway* case), and an appeal from the discharge of one of the named plaintiffs, *Pettway and Wrenn v. American Cast Iron Pipe Company*, 411 F.2d 998 (5th Cir. 1969), the class action charges were tried in the District Court in October, 1971. After the trial, the District Court found, *inter alia*, that some injunctive relief was appropriate, but that the class was not entitled to back pay due to the good faith efforts of the company to comply with the equal employment laws and regulations and because a back pay award was not necessary to insure future compliance therewith. *Pettway v. American Cast Iron Company*, 7 FEP 1010 (N.D. Ala. 1972).

On appeal, the Fifth Circuit reversed the District Court's decision, holding, *inter alia*, that on remand, the District Court should issue a broader injunction. The Fifth Circuit further held that the proper relief on remand should also include an award of back pay. *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211 (5th Cir. 1974) (App. 1) *(Pettway III")*.

In an advisory portion of the opinion in *Pettway III*, the Fifth Circuit discussed various possible methods of determining back pay for class members, including both an

individual-by-individual approach and a classwide approach.[2] 494 F.2d at 261-63 (App. 75-83). In discussing the individual-by-individual approach to adjudicating back pay claims at Stage II, the Fifth Circuit stated the "maximum burden" that could be placed on an individual back pay claimant in this case is to require a statement of (1) his current position and pay rate, (2) the jobs he was denied because of discrimination and their pay rates, (3) a record of his employment history with the company and other evidence that qualified or would have qualified him for the denied positions, and (4) an estimation of requested back pay. 494 F.2d at 259-60 (App. 77). The court noted that the "key is to avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class or the determinants too narrowly." 494 F.2d at 262 n. 152 (App. 81 n.152). In discussing the various approaches that might be utilized by the District Court, the Fifth Circuit stated that "the District Court is not limited to this particular alternative," referring to a particular classwide approach. 494 F.2d at 263 (App. 83). The court left the method to be utilized in computing back pay to the sound discretion of the District Court.

On remand from *Pettway III*, the District Court encouraged the parties to engage in settlement negotiations di-

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[2]In his special concurrence in *Pettway III*, Judge Bell termed the portion of the court's opinion having to do with determining back pay for the class as "advisory." Judge Bell stated that "I do not join in those advisory portions of the opinion (pp. 260-264), having to do with determining back pay for the class. I prefer to wait for a concrete case involving an award of back pay before deciding whether the suggested approaches are valid in law." 494 F.2d at 267 (App. 90).

Indeed, on page 65 of plaintiffs-appellants' brief to the Fifth Circuit the following language is found:

> The only issue before the district court was whether any back pay should be awarded. The amount of back pay, the recipients of the back pay, and *the procedure for allocating back pay to the designated recipients was severed from the trial on the motion of plaintiffs for a submission to a special master.* (emphasis added).

rected toward the fashioning of a decree to carry out the Fifth Circuit's mandate. A settlement was reached, and on June 12, 1975, the District Court issued its final judgment ordering injunctive relief and awarding back pay in the amount of $1,000,000.00 plus $220,000.00 in atttorney's fees. Plaintiffs' counsel, present United States District Judge U. W. Clemon and Associate Alabama Supreme Court Justice Oscar W. Adams, Jr., declined to appeal the judgment. Nevertheless, the named plaintiffs and a number of the class members retained Robert L. Wiggins, Jr., present class counsel, who filed an appeal, which resulted in the *Pettway IV* decision.

In *Pettway IV*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) (App. 93), the Fifth Circuit held, *inter alia*, that certain aspects of the injunctive relief portion of the District Court's decree did not go far enough and that the District Court's approval of the back pay settlement was an abuse of discretion. The court ordered the District Court to put into immediate effect an injunctive decree providing for plant-wide bidding on vacancies in the non-craft lines of progression, limited only by objective qualifications.

In discussing back pay relief, the court in *Pettway IV* approved the language in *Pettway III* concerning the "maximum burden" that could be placed on an individual at Stage II and again reiterated the broad discretion given to the District Court in deciding which approach to take in resolving the class members' entitlement to back pay. 576 F.2d at 1212-13 (App. 182-184). Moreover, the Fifth Circuit suggested that if the District Court chose the individual-by-individual approach that it so notify class members of their obligations in this regard, stating that:

> If Stage II is reached on remand, and the court chooses to proceed on an individual-by-individual basis rather than utilize one of the classwide approaches suggested in *Pettway III*, 494 F.2d at 261-63, notice to class members explaining this obligation to provide information to the court would be appropriate.

Id at 1213 n.67 (App. 183 n.67).

On remand from *Pettway IV*, the District Court entered an order conforming the injunctive decree issued in the case on June 12, 1975 to the Fifth Circuit's mandate. Negotiations then immediately commenced concerning settlement of the injunctive and declaratory relief aspects of the case, and discovery commenced concerning the back pay issues.

On February 1, 1979, plaintiffs filed a blanket request for production of documents to the company. As a result of this request plaintiffs were provided access to and furnished copies of all relevant employee job history cards, bid records, W-2 earnings information, hourly rate of pay information, and job declination and waiver records. Indeed, a number of these records were furnished to plaintiffs precoded by the company as to seniority date and race.

In accordance with the court's suggestion in *Pettway IV*, 576 F.2d at 1213 (App. 183), on October 25, 1979 the District Court issued an order whereby notice was sent to all putative class members requiring them to file a written claim on or before December 1, 1979 if they wished to assert a claim for back pay. Approximately 1215 putative class members responded by filing such claims. The form of the notice was stipulated to between the parties.

After extensive negotiations, on June 18, 1980, the District Court tentatively set a hearing on the suggestion of counsel regarding a proposed consent decree resolving the injunctive and declaratory aspects of this case. In the order the District Court ruled that "Upon entry by the court of a final injunctive decree . . . the court will proceed forthwith with all possible speed to adjudicate the back pay claims of all affected employees."

On July 14, 1980 a hearing was held pursuant to notice sent to the putative class members affording them an opportunity to object to the proposed consent decree. On July 16, 1980, the consent decree was approved by the District Court and entered on the record. No appeal was taken from that order, and on September 5, 1980, plaintiffs were provided an interim award of attorney's fees.

On October 20, 1980, interrogatories which had previously been filed by the company on December 21, 1979

were modified and approved by the Court for mailing to all putative class members who had filed writtten notices of intent to participate in the back pay proceedings. The putative class members were given ninety (90) days to file their answers with the Court. Thereafter, plaintiffs were given four extensions of time within which to file their answers, and only 833 of the 1215 putative class members filed answers to the company's interrogatories.[3]

On July 16, 1981, plaintiffs filed their Motion for Evidentiary Hearing which sought a hearing in which they could submit evidence in support of classwide methods of adjudicating back pay claims. Although the District Court did not afford either party an evidentiary hearing on the issue of how to proceed at Stage II, each party submitted a proposed Order of Reference, and a hearing was held on July 17, 1981 in which plaintiffs were given the opportunity to present all their arguments in support of a classwide approach to adjudicating the back pay claims in this case. After this hearing, on July 20, 1981, the District Court entered its Order of Referral to Special Master. (App. 203).

The District Court's Order of Referral to Special Master first requires the Special Master to conduct proceedings to determine which of the putative class members have timely filed with the Court a notice of intent to participate in the back pay phase of this case. The order further provides that the parties are allowed to file additional motions with the Special Master prior to trial to further restrict or enlarge a subclass of back pay claimants.[4] (App. 204 ¶ 4). The Special Master may, at his discretion, then divide the putative class into manageable subclasses, preferably along departmental lines.[5] (App. 205 ¶ 7).

The District Court also ordered the Special Master to proceed with the determination of back pay on an individual-by-individual basis. Finally, the Order of Referral

[3]The company filed a motion to dismiss the claims of those class members who failed or refused to answer interrogatories, but who had filed written claims. This motion is pending before the Special Master.

[4]This part of the order was not an issue in the last appeal.

[5]This part of the order was not an issue in the last appeal.

to Special Master imposes a burden of proof regarding back pay adjudication in accordance with the Fifth Circuit's decisions in *Pettway III* and *IV* except that the District Court ordered the individual back pay claimants to *establish*, rather than simply make a *statement* of, (1) his current position and pay rate; (2) the jobs he was denied because of discrimination and their pay rates; (3) a record of his employment history with the company and other evidence that qualified or would have qualified him for the denied positions; and (4) an estimation of requested back pay "in accordance with the decisions of the Fifth Circuit Court of Appeals and the United States Supreme Court." (App. 206).

On July 21, 1981, plaintiffs, pursuant to 28 U.S.C. § 1292(b), moved for certification of appeal, *inter alia*, of the District Court's Order of Referral to Special Master. On July 22, 1981, plaintiffs' motion was denied. On or about August 5, 1981, plaintiffs filed a Petition for Writ of Mandamus attacking the individual-by-individual approach to adjudicating the back pay claims at Stage II under the order of reference. Plaintiffs' petition was denied by the Fifth Circuit on August 19, 1981. In denying the Petition for Writ of Mandamus, the court stated: *"It is clear that the interference in [these] proceedings at this time would be premature and inappropriate." In re Rush Pettway*, No. 81-7647 (5th Cir. August 19, 1981) (App. 209) (emphasis added).

On August 19, 1981, plaintiffs also filed a Notice of Appeal from the Order of Referral to Special Master, raising the same objections previously argued in their Petition for Writ of Mandamus. Plaintiffs asserted appellate jurisdiction under the collateral order doctrine as enunciated by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964)

Over the Company's objections, the court below not only took the appeal, but accorded it preference. Oral argument was heard on May 25, 1982. The Eleventh Circuit entered its judgment in this action on July 15, 1982. *Pettway v. American Cast Iron Pipe Company*, 681 F.2d 1259 (11th Cir. 1982) (App. 211).

In its opinion entered on July 15, 1982, the Eleventh Circuit vacated and remanded the District Court's Order of Referral to Special Master which directed the Special Master to adjudicate the back pay claims in this action on an individual-by-individual basis. The court held, *inter alia*, that (1) it had jurisdiction to hear the appeal; (2) a classwide approach to adjudicating back pay claims was required, unless the district court "determines that relief *cannot* be given upon a classwide basis;" 681 F.2d at 1266 (App. 223). (emphasis in original); and (3) that the District Court erred in imposing upon an individual back pay claimant "the burden of *establishing, i.e., proving* that he had been denied a specific job or jobs because of discrimination and of *proving* that he was qualified." 681 F.2d at 1267 (App. 223) (emphasis in original).

Petitioner timely filed a Suggestion for Rehearing *En Banc* which was denied on September 27, 1982. (App. 229).

REASONS FOR GRANTING THE WRIT

1. The Court Below Erred in Holding That It Had Appellate Jurisdiction Under the Collateral Order Doctrine, as Enunciated by This Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), and Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), to Review the District Court's Order of Referral to Special Master Which Directs the Special Master to Proceed at Stage II With the Determination of the Back Pay Claims of the Putative Class on an Individual-by-Individual Basis.

28 U.S.C. § 1291 vests the courts of appeals with "jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." This Court has stated that a "final decision" is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). The policy underlying this rule is that restricting appellate review to "final decisions" prevents the "debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence,

but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court carved out a very narrow exception to 28 U.S.C. § 1291. In *Cohen*, the Court of Appeals for the Third Circuit reversed the district court and held that plaintiffs in a shareholder's derivative action must post security for costs as required by a New Jersey statute. Since plaintiffs did not have sufficient assets to post the security, this Court accepted review stating that the order below fell within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. This Court went on to rule, "We hold this order appealable because it is a *final disposition of a claimed right* which is *not an ingredient of the cause of action* and does *not require consideration with it.*" 337 U.S. at 546-47 (emphasis added). It is important to note that *Cohen* was rendered prior to the passage of the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b).[5]

In *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), plaintiff brought suit for the wrongful death of her son in

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[5]At least one commentator has questioned the viability of *Cohen* today, in view of the subsequent passage of 28 U.S.C. § 1292(b), the 1963 amendment to Rule 54(b), Fed.R.Civ.P., and supervisory mandamus:

> The [*Cohen* doctrine] emerged at a time when the final judgment rule was inflexible. Much has happened since. The Interlocutory Appeals Act of 1958 made potentially appealable very nearly all orders that present serious, undecided questions. The 1963 amendment of Rule 54(b) made potentially appealable a host of other orders. Finally, the still evolving doctrine of supervisory mandamus is available for the review of new, important and unsettled questions. Indeed if that practice gains general acceptance, the *Cohen* rule should be revoked. If the rule is restricted, as it should be to "serious and unsettled questions," it and supervisory mandamus perform the same function.

9 Moore's Federal Practice ¶ 110.10 (2d ed. 1980). *See also Briggs v. Goodwin*, 569 F.2d 10, 26 n.14 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

her capacity as administratrix of his estate. The complaint sought recovery not only under the Jones Act, but also, by way of the Ohio wrongful death act, for unseaworthiness of the vessel on which plaintiff's son had been working. On motion of the defendant, the district court entered an order (1) striking all references to unseaworthiness and the Ohio statute, and (2) all references to recovery for the benefit of decedent's dependent brother and sisters. This order left standing the complaint for damages only for the plaintiff herself under the Jones Act. Plaintiff appealed the order that limited the scope of her complaint, and the defendant responded with a motion to dismiss the appeal. The court of appeals thought that the question of finality was "close." It pretermitted the question of appealability, however, simply deciding the appeal on the merits in light of the fact that it had concluded that the order should be affirmed. 321 F.2d 518 (6th Cir. 1963).

In the Supreme Court, *both parties urged that § 1291 did not require dismissal of the case for want of jurisdiction in the court of appeals, and that the case should be decided on the merits.* In upholding jurisdiction under *Cohen*, this Court stated:

> [I]n deciding the question of finality the most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." Such competing considerations are shown by the record in the case before us . . . . And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided . . . . We think that the questions presented here are equally "fundamental to the further conduct of the case." It is true that if the District Court had certified the case to the Court of Appeals under 28 U.S.C. § 1292(b) (1958 ed.), the appeal unquestionably would have been proper; in light of the circumstances we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in § 1292(b) by treating this obviously marginal case as final and appealable under 28 U.S.C. § 1291 (1958 ed.).

379 U.S. at 152-54[7]

Analyzing this case in light of *Cohen* and *Gillespie* reveals the total perversion of 28 U.S.C. § 1291 committed by the court below. On July 21, 1981, plaintiffs in this case, pursuant to 28 U.S.C. § 1292(b), moved for certification of appeal. On July 22, 1981, plaintiffs' motion was denied. Next, on or about August 5, 1981, plaintiffs filed a Petition for Writ of Mandamus in which they argued, in pertinent part:

> Mandamus is the appropriate remedy to correct the abuse of the mandate which is occurring in the court below. . . . The proceedings on remand below should not be permitted to progress toward individual-by-individual trials in the absence of compliance with this Court's mandate.

Petition for Writ of Mandamus at 26 & 28. After considering detailed briefs filed on behalf of both parties, Judges

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[7]This Court subsequently severely restricted its decision in *Gillespie* in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). In that case this Court held that a determination that an action may not be maintained as a class action is not appealable under either *Cohen* or *Gillespie*. In rejecting jurisdiction under *Gillespie*, the Court stated:

> Respondents also suggest that the Court's decision in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199, supports appealability of a class-designation order as a matter of right. We disagree. In *Gillespie*, the Court upheld an exercise of appellate jurisdiction of what it considered a marginally final order that disposed of an unsettled issue of national significance because review of that issue unquestionably "implemented the same policy Congress sought to promote in § 1292(b)," *id.*, at 154, 85 S.Ct. at 312, *and the arguable finality issue had not been presented to this Court until argument on the merits, thereby ensuring that none of the policies of judicial economy served by the finality requirement would be achieved were the case sent back with the important issue undecided.* In this case, in contrast, respondents sought review of an inherently nonfinal order that tentatively resolved a question that turns on the facts of the individual case; and, as noted above, the indiscriminate allowance of appeals from such discretionary orders is plainly inconsistent with the policies promoted by § 1292(b). *If Gillespie were extended beyond the unique facts of that case, § 1291 would be stripped of all significance.*

437 U.S. at 477 n.30 (emphasis added).

Hill, Vance, and Henderson of the Fifth Circuit denied the Petition, holding:

> It is clear that the interference in [these] proceedings by this court at this time would be premature and inappropriate.

In re Rush Pettway, No. 81-7647 (5th Cir. August 19, 1981). Then, their request for review having been properly denied when pursued by the appropriate avenues, plaintiffs filed an appeal making the exact same arguments.

The court below accepted jurisdiction under *Cohen* and *Gillespie* because it conceived, "The effect of the trial court's order . . . . was in effect to kill the class recovery entirely, and leave open only some relatively small number of individual claims." 681 F.2d at 1265 (App. 220). The Eleventh Circuit had absolutely no factual basis for making this appellate prognostication on the result of the individual-by-individual back pay adjudications to be conducted by the Special Master. Moreover, the court's prognostication was made even prior to rulings on motions to restrict the class and to delineate subclasses. The tendency of former Fifth and now Eleventh Circuit judges to so find facts and reach conclusions devoid of support in the record on appeal has previously received this Court's attention and instruction in *Pullman-Standard v. Swint*, 102 S.Ct. 1781 (1982). Nevertheless, as the decision below indicates, further instruction is apparently needed. In any event, this case simply does not meet the standards prescribed by this Court in *Cohen* and *Gillespie*.

First, the circuits have held that an order of reference is not appealable under the *Cohen* doctrine. *See, e.g., Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977) (citing cases that denied review under the *Cohen* doctrine, the Second Circuit held that an "order of reference is not a final judgment or order and is not reviewable on appeal"); *United States v. 91.69 Acres of Land*, 334 F.2d 229, 231 n.2 (4th Cir. 1964). Moreover, this Court and other circuits have held that mandamus, not appeal, is the

proper remedy when there has been an improper reference to a master.[8] *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Loral Corp. v. McDonnell Douglas Corp.*, *supra*.

Second, the District Court's order that the back pay claims in this case shall be adjudicated on an individual-by-individual basis does not involve any "claim of right."[9] *Compare Cohen* 337 U.S. at 546. The order merely sets forth the method to be utilized by the Special Master in hearing the back pay claims of the members of the class. Moreover, the method and burden of proof to be utilized at Stage II are most certainly "ingredients of the cause of action," and are not "independent of the cause" as was the order involved in *Cohen*. *Compare Cohen* 337 U.S. at 546-47. Finally, the Order of Referral is not "finally dispositive" of any class member's claim for back pay. *Compare Cohen* 337 U.S. at 546.

Hence, there is no basis for jurisdiction under *Cohen* and accordingly under *Gillespie* since that decision is based upon *Cohen* and has been restricted to its facts by this Court. There is no logical reason why the trial court should be precluded from trying what the Eleventh Circuit envisioned as a "relatively small number of individual claims," thereby establishing finality under 28 U.S.C. § 1291 for an appeal. 681 F.2d at 1265 (App. 220). Indeed, such an approach has been mandated by this Court in the similar situation of a class certification denial, which kills the class recovery and leaves open only a small number of individual claims of the named plaintiffs. *Coopers & Lybrand v. Livesay*, 437 U.S. at 469 (interlocutory orders involving "considerations that are emeshed in the factual and legal issues comprising the plaintiff's cause of action" are not appealable under the *Cohen* doctrine).

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[8]As previously discussed, plaintiffs' Petition for Writ of Mandamus was properly denied as being premature and inappropriate. *In re Rush Pettway*, No. 81-7647 (5th Cir. August 19, 1981) (App. 209).

[9]*Cf. Abney v. United States*, 431 U.S. 651 (1977) (a claim of violation of the double jeopardy clause); *Stack v. Boyle*, 342 U.S. 1 (1951) (a claim of violation of the statutory and constitutional right to bail).

The Eleventh Circuit has totally disregarded the requirements of the *Cohen* doctrine and has exceeded its appellate authority in granting review under that doctrine. Plaintiffs were unsuccessful in invoking two avenues of review available to them because, as stated by the Fifth Circuit, review at this stage would be "premature and inappropriate." The writ of certiorari should issue to correct the Eleventh Circuit's premature and inappropriate ruling in serious disregard of 28 U.S.C. § 1291 and decisions of this Court.

II. **In Mandating a Classwide Approach to the Adjudication of Back Pay Claims and Absolving Individual Class Members of Any Burden of Proof of Individual Loss, the Decision Below Conflicts Directly with this Court's Decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and with the Decisions of Other Circuits.**

The decision of the Eleventh Circuit Court of Appeals below, in mandating a classwide approach to the adjudication of back pay claims, and absolving individual class members of any burden of proof of individual loss, conflicts directly with the decision of this Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and with the decisions of at least five other circuits. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), this Court established the principle that proof of systemic discriminatory employment practices will justify prospective systemic injunctive relief, but where the plaintiff seeks individual relief, in *Teamsters* retroactive seniority, "the district court must usually conduct additional proceedings . . . to determine the scope of individual relief." 431 U.S. at 361.[10]

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[10]The Eleventh Circuit mandated a classwide approach to the adjudication of back pay claims in this case based on the unsubstantiated conclusion in the advisory portion of the opinion in *Pettway III* to the effect that to require each individual employee to prove his separate back pay entitlement is to require the impossible. 494 F.2d at 260-63 (App. 77). Again the Eleventh Circuit found facts and reached conclusions devoid of any support in the record on appeal, and in total disregard of

Teamsters also dealt specifically with the burden of proof applicable to individuals who claim they were denied past promotions or transfers due to discrimination. In *Teamsters*, this Court said that individual claimants should be divided into two groups, one group including persons who had actually applied for promotions or transfers but were denied them, and the other including persons who had not applied (nonapplicants). It found individual hearings to be necessary with respect to both groups, but that the burden of proof placed on a particular claimant varied according to the group of which he was a member. Applicants, the Court said, need only prove that they applied, and

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this Court's decision in *Pullman-Standard v. Swint, supra.* This Court should not tolerate such a disregard of its decisions.

In any event, through the process of discovery, plaintiffs have been furnished the employment history cards of hourly employees for all times relevant to this action. These cards reflect the movement of hourly paid employees during all relevant periods of time and therefore reflect the existence of vacancies. Job vacancies, by title and by date, can be identified. Rates of pay for all hourly jobs for all relevant periods of time have also been provided to the plaintiffs, thereby facilitating any calculation as to alleged lost back pay. In addition, plaintiffs have been provided bid records for that period of time when the bidding procedure was in effect, as well as written job declinations and waivers executed by class members during that period of time. The same basic information has been made available with respect to the filling of apprenticeship vacancies and supervisory positions.

Moreover, on October 20, 1980, interrogatories were served by defendant on the 1215 putative class members who indicated an intent to participate in the back pay proceedings in this action. Of these putative class members, 833 filed answers to the interrogatories. In those answers the class members have specifically identified which jobs they claim they were denied because of discrimination and their qualifications for those positions. Indeed, in a considerable number of the answers the class members have expressly stated a desire for one or more jobs and the names of certain management employees who allegedly denied their requests.

Thus, utilizing the information concerning job movements that have previously been provided the plaintiffs, combined with the answers to defendant's interrogatories, there is no practical or logical reason why members of the class cannot state the jobs they were denied because of discrimination and process their back pay claims through an individual-by-individual approach.

> . . . the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

Id. at 362. With respect to nonapplicants, the category encompassing most of the potential claimants in the present case, the Court stated that the plaintiff:

> . . . must carry its burden of proof, *with respect to each specific individual*, at the remedial hearings to be conducted by the District Court on remand.
>
> The task remaining for the District Court on remand will not be a simple one. Initially, *the Court will have to make a substantial number of individual determinations* in deciding which of the minority employees were actual victims of the company's discriminatory practices. After the victims have been identified the Court must, as nearly as possible, " 'recreate the conditions and relationships that would have been had there been no' " unlawful discrimination. *Franks*, 424 U.S., at 769, 96 S.Ct., at 1266. This process of recreating the past will necessarily involve a degree of approximation and imprecision.

431 U.S. at 371-72. (emphasis added). This Court in *Teamsters* added:

> Because [the nonapplicant] is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy *burden of proving* that he would have applied for the job had it not been for those practices.

431 U.S. at 367-68. (emphasis added).

* * *

> Resolution of the nonapplicant's claim . . . requires two distinct determinations: that he would have applied but for discrimination and that he would have been discriminatorily rejected had he applied.

431 U.S. at 368 n.52. The decision below disregards this Court's direction in *Teamsters* that "individual hearings" are usually necessary to properly fashion individual relief such as back pay. Moreover, it jeopardizes and may deprive the company of the opportunity to demonstrate lawful reasons why applicants were not promoted or transferred, and absolves nonapplicants of any burden of proof whatsoever, both results being directly contrary to *Teamsters*.

The decision by this Court in *Teamsters* logically follows this Court's reasoning in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), where this Court stated: "Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination . . . and compensation shall be equal to the injury;" and *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 772 (1976) where this Court stated that the employer must be afforded an opportunity to show that specific individuals "were not in fact victims of discrimination." *Teamsters* is correct both legally and logically and cannot properly be disregarded by the Eleventh Circuit Court of Appeals.

The decision below by the Eleventh Circuit Court of Appeals also reaches the opposite result from that reached by the Sixth Circuit Court of Appeals in *Mitchell v. Mid-Continent Spring Co.*, 583 F.2d 275 (6th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979). In *Mitchell*, a sex discrimination class action, a special master ordered that $222,885.00 be divided among all members of a plaintiff class according to a formula and certain qualifying criteria. The special master's decision to use a formula rather than individual adjudications was based on the large number of class members involved (340), the total length of time which would be involved and the difficulty of isolating the effects of the various discriminatory assignment, seniority and transfer policies of the defendant employer. In reversing the district court's acceptance of the special master's determination, the Sixth Circuit stated:

> If it is true that individual determinations are impossible, the class action aspects of this case should forth-

> with be dismissed. No individual should ever be permitted to recover damages in a case which he or she finds it is impossible to prove.

583 F.2d at 283 n.11. The Sixth Circuit ordered the district court to use the individual-by-individual approach set forth in *Teamsters*. *See also Franks v. Kroger Co.*, 649 F.2d 1216, 1226 n.7 (6th Cir. 1981) ("While *Teamsters* requires that individual relief may be granted only on the basis of an individualized finding of discrimination, each member of the class is presumptively entitled to relief once a pattern or practice of discrimination has been shown.")

In agreement with the Sixth Circuit, the Fourth Circuit in *EEOC v. Korn Industries, Inc.*, 662 F.2d 256 (4th Cir. 1981), rejected as "absurd" classwide approaches to damages suggested by the EEOC and relying on *Teamsters*, stated as follows:

> It was not envisioned that the back pay proceeding would be uncomplicated: the district court is required to make individual determinations to decide which of the minority employees have been "actual victims" of the discrimination and it will then have to "recreate the conditions and relationships that would have been" in existence in the absence of unlawful discrimination, *Teamsters*, 431 U.S. at 372, 97 S.Ct. at 1873, *quoting Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769, 96 S.Ct. 1251, 1266, 47 L.Ed.2d 444 (1976), a process which "will necessarily involve a degree of approximation and imprecision." *Id.*, *see also White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1084 (4th Cir. 1977) ("hypothetical employee" must be constructed).
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> * * *
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> *The record indicates that the Commission was clearly not interested in participating in a case-by-case determination of damages* but instead proposed what the district court accurately characterized as an "absurd" theory of class damages: this theory apparently contemplated a lump sum award to the group to be distributed in some unascertained fashion among the affected blacks.

662 F.2d at 260-62. (emphasis added). The split between the circuits can truly be characterized as serious and in need of this Court's attention when, as here, one Circuit Court characterizes as "absurd" an approach which another Circuit Court finds to be not only permissible but mandatory.

Similarly, in *Kyriazi v. Western Electric Co.*, 465 F.Supp. 1141 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981), the district court specifically rejected a classwide computation method suggested by the Eleventh Circuit in this case, the pro rata method, and appointed three special masters to hear the back pay claims "in an effort to assure backpay awards on as individualized basis as possible." 465 F.Supp. at 1146.

Also contrary to the decision below is *McKenzie v. Sawyer*, 684 F.2d 62 (D.C. Cir. 1982). In *McKenzie* the D. C. Circuit held that a district court's decision requiring individualized back pay hearings at Stage II was not an abuse of discretion. The court stated:

> We can dispose quite easily of the plaintiffs' contention that the district court erred in requiring individualized hearings at the relief stage. *Teamsters*, while it does not mandate individualized hearings in every case, does require some demonstration that the individual class members receiving compensation were likely victims of illegal discrimination, 431 U.S. at 361, 97 S.Ct. at 1867. The district court must determine whether the plaintiffs' proof at the liability stage is sufficient to establish victimization — as it would be, for example, if all white employees similarly situated to the plaintiffs automatically received a benefit denied to the plaintiffs. If the district court determines that evidence at the liability stage does not identify all members of the plaintiff class as possible victims, however, further evidentiary proceedings are requisite. *Id.* at 368, 97 S.Ct. at 1871.
>
> The district court's decision to require further showings of the plaintiffs here was entirely reasonable. The benefits illegally denied to the plaintiffs as a class were opportunities neither automatically sought nor automatically bestowed. Not all printing plant workers

> at GPO could expect to receive journeyman training nor is it reasonable to assume that all journeymen would wish to assume supervisory responsibilities. We note that it may prove difficult to work out the details of the back pay arrangement, as it is possible that more than one member of the plaintiff class may be able to show that he would have applied for a particular vacancy, but we leave such complications, should they ensue, in the first instance to the district court.

684 F.2d at 76. The present decision deprives the district court below of the discretion allowed district courts in the D.C. Circuit.

The decision below conflicts even with the prior decisions of the Fifth Circuit, the Eleventh Circuit's predecessor, decisions to which it agreed *en banc* to be bound by, *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), but now ignores. For example, in *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974), the Fifth Circuit recognized that it "*was impossible for an individual discriminatee to recreate the past with exactitude,*" but nevertheless adhered to individualized proof of back pay claims:

> Our holding does not necessarily mean every member of the class is entitled to back pay. Individual circumstances vary and not all members of the class are automatically entitled to recovery. *There should be a separate determination on an individual basis as to who is entitled to recovery and the amount of such recovery.*

491 F.2d at 1375. (emphasis added).

In *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974), the Fifth Circuit stated:

> Assuming that the class does establish invidious treatment [in Stage I], the court should then proceed to resolve whether a *particular employee* is in fact a member of the covered class, has suffered financial loss, and thus entitled to back pay or other appropriate relief.

495 F.2d at 444. (emphasis added). The Fifth Circuit in *Baxter* also enumerated a series of factors which could influence the individual back pay determinations:

> Each individual presents unique characteristics and qualities . . . Accordingly, on remand the initial burden will be on the individual discriminatee to show that he was available for promotion and possessed the general characteristics and qualifications which are shown by Savannah to be possessed by the higher paid white employees and are job related.

495 F.2d at 444-45.

In *United States v. United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975), *appeal after remand*, 638 F.2d 753 (5th Cir. 1981), the Fifth Circuit again emphasized the propriety and desirability of utilizing an individual-by-individual approach at Stage II. The court stated:

> Any causation burden which the Court imposes on the group [at Stage I], as such, must be not only minimal in weight, but also very general in scope, so as to avoid converting the procedure into the protracted *series of claimant-by-claimant trials which Baxter commits to a later stage.*
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> * * *
>
> Insofar as the district court may conclude that additional back pay is now in order, the burden of proof rules respecting individual claims are set forth in *Baxter*, 495 F.2d at 443-45, and *Johnson v. Goodyear*, 491 F.2d at 1379-80. *These rules generally contemplate a scheme of proof, computation and distribution initiated by a series of claimant-by-claimant trials, and we have spoken accordingly heretofore in describing the functions of Stage II.*

520 F.2d at 1054-55. (emphasis added).[11] In *United States Steel*, the Fifth Circuit closed with the following admonition:

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[11] *See also Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982), a § 1983 action, wherein the Fifth Circuit stated:

> [W]e reemphasize that alternative methods possessed of superior certainty should be exhausted before the court resorts to racially-drawn classwide comparisons or pro rata approaches. See Judge Bell's specially concurring opinion in *Pettway, supra*, 494 F.2d at 267. Similarly, the indiscriminate black-white wage averaging approach advanced by plaintiffs and rejected by the district court, 371 F.Supp. at 1060 n.40, would seem to be foreclosed by our decision in *Georgia Power* as a basis for making individual awards, see 474 F.2d at 921-22, absent at least a precise breakdown of subgroups from the standpoint of plant age.

520 F.2d 1056. *See also Williams v. N.O. Steamship Ass'n*, 29 FEP 1723, 1725 (5th Cir. 1982) ("a district court has broad discretion in conducting the so-called 'Stage II' proceeding, and it is the province of the district court to formulate the remedies.").

Citing *United States Steel*, the authors in Schlei & Grossman, *Employment Discrimination Law* 1275 (1976) state that "[t]he clear preference of the courts with respect to back pay entitlement is for an individual-by-individual determination of how vacancies would have been filled during the relevant time frame absent discrimination." *Contra Sears v. Atchison, T&S Ry. Co.*, 645 F.2d 1365 (10th Cir. 1981); *Hameed v. International Ass'n of Bridge, etc.*, 637 F.2d 506 (8th Cir. 1980).

The decisions of the Third, Fourth, Fifth, Sixth, and D.C. Circuits are consistent but conflict with the decision below by the Eleventh Circuit. Decisions in the Eighth and Tenth Circuits permit classwide approaches but do not mandate them. Those two courts leave the method to be utilized in computing back pay to the sound discretion of the district courts. Only the Eleventh Circuit deprives its district courts

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Separate hearings on various issues are of course common practice in class actions. The *typical case* is one in which a defendant's liability to the class is determined at a single hearing, and then separate hearings are held on *each* class member's claim for relief. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

669 F.2d at 336 n.18. (emphasis added)

of this discretion. No case in American jurisprudence, other than the decision below, *requires* a classwide presentation at Stage II. Since the decisions of the courts of appeal vary so widely on this important issue, the assistance of this Court is urgently needed to insure the proper and uniform administration of justice.

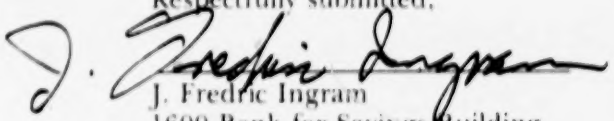
Finally, the American Cast Iron Pipe Company's promotional and transfer system was and is predicated largely upon qualifications to perform the job sought or desired. The existence, *vel non*, of qualifications to fill certain positions must be adjudicated on an individual basis. Other highly individualized defenses, such as the failure of an individual to bid or seek a given position, the fact that an individual declined or waived a given position when proffered, the declination of training necessary to fill the vacancy in question, the superior qualifications of the individual selected, and other such valid defenses to individual claims will be seriously jeopardized and largely unavailable to the company if some classwide formula is utilized in adjudicating the back pay claims in this action. Depriving American Cast Iron Pipe Company of the right to individual hearings effectively deprives it of the right to a defense. Thus, this case presents serious and recurring questions involving fundamental issues of procedure and proof.

Because the decision of the court below in mandating a classwide approach to back pay and absolving claimants of any burden of proving individual loss conflicts with *Teamsters*, with the decisions of at least five other circuits, and is legally incorrect, a writ of certiorari should be granted.

CONCLUSION

In light of the foregoing, this Court should issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, reverse the judgment of the court of appeals, and remand with directions to either dismiss the appeal, or, in the alternative, enter a judgment affirming the judgment of the District Court on the issues raised herein.

Respectfully submitted,



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PROOF OF SERVICE

I, J. Fredric Ingram, a member of the Bar of this Court, as counsel of record for petitioner herein, American Cast Iron Pipe Company, hereby certify that three copies of the above and foregoing Petition for Writ of Certiorari, together with appendices thereto, have been served by United States mail, postage prepaid and properly addressed upon Robert L. Wiggins, Jr., Attorney at Law, Suite 716 Brown-Marx Building, 2000 1st Avenue North, Birmingham, Alabama 35203, and Ms. Marcia B. Ruskin, Office of General Counsel, Equal Employment Opportunity Commission, 2401 E. Street, Washington, D.C. 20506 on this the 22nd day of December, 1982.

J. Fredric Ingram